

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1068

To be argued by
STEVEN LLOYD BARRETT

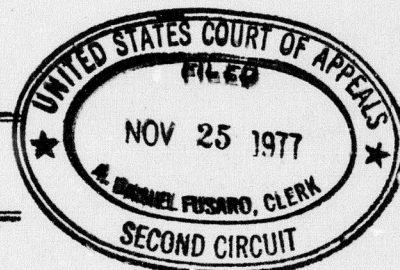
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
BARBARA MEYERS,
Defendant-Appellant.

Docket No. 77-1068

BRIEF FOR APPELLANT



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
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FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the inclusion in the court's charge of extraneous material pertaining to some other criminal prosecution prejudiced appellant by implying her involvement in additional criminal proceedings not disclosed to the jury.
2. Whether the jury was misapprised on the requirement of knowledge, the assessment of appellant's truthfulness, the

limited use of other crimes evidence, and the standard of voluntariness applicable to appellant's statement, by the prosecutor's exaggerations and misstatements, and by corresponding deficiencies in the court's charge.

3. Whether the maximum probation period imposable on a split sentence under 18 U.S.C. §3651 may not exceed the length of that portion of the original sentence which has been suspended by the court, and consequently appellant's probation sentence was illegal.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable George Pratt), rendered January 28, 1977, after a jury trial, convicting appellant Barbara Meyers of possessing a United States Treasury check which had been the contents of a letter stolen from an authorized mail depository (18 U.S.C. §1708). Appellant was sentenced to a term of three years to be served as a split sentence (18 U.S.C. §3651): three months in a jail-type institution, the remainder of the sentence suspended, and a probation term of four years to commence upon completion of the jail sentence. The district court entered a stay of execution of sentence pending determination of the

appeal.

By order dated September 21, 1977, this Court appointed The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.*

STATEMENT OF FACTS

A. The Evidence

Appellant Barbara Meyers was charged with possession of a United States Treasury check payable to a Mrs. Giosebdina Scala which had been the contents of a letter stolen from Mrs. Scala's mailbox on December 3, 1975. Appellant did not contest the fact that the check had been stolen from a mail depository or the fact that she had possessed the check and presented it to a Mr. Frank Indelicato, a local merchant, who cashed it. Appellant did contest the fact that she had knowledge that the check was stolen. As the Government's proof demonstrated, the check had been stolen by a Mrs. Donna Chiarello, appellant's sister-in-law, who then gave the check to appellant to be cashed, and appellant, believing that Mrs. Chiarello was lawfully in possession of the endorsed check, took it to her local market.

*The scheduling order of September 21, 1977, is the fifth scheduling order in this case; the first four were entered prior to the assignment of this office as counsel. In the period between February 9, 1977, when the notice of appeal was filed, and September 19, 1977, when trial counsel, who had been continued on appeal pursuant to the Criminal Justice Act, was relieved upon the defendant's pro se motion, The Legal Aid Society, Federal Defender Services Unit, was not involved in the case.

It was the question of appellant's knowledge which was the factual focus of the trial.

1. The Government's Case

Giosebdina Scala received a Social Security check from the Government on the third day of every month (T.23*). On December 3, 1975, she returned home from shopping to discover that the lock on her mailbox had been removed (T.24). She did not receive her December Social Security check; that check, the Government's Exhibit #1, was endorsed with her name, but the signature was not hers (T.24). A certified document of the Department of the Treasury, Division of Disbursements, was offered to prove that Mrs. Scala's check had been mailed to her on November 29, 1975 (T.27).

Donna Chiarello, whose late husband was appellant Barbara Meyers' brother, admitted stealing Mrs. Scala's check (T.29, 33). On December 2, 1975, she met appellant Meyers at the latter's home and agreed to steal a Social Security check the following morning (T.31). On the morning of December 3, she and appellant Meyers drove to a building at 17th Avenue and Benson Avenue; appellant, who was driving, remained in the car, while Mrs. Chiarello entered the building and opened the mailbox using a screwdriver. Mrs. Chiarello removed a Social Security

*Numerals preceded by "T" in parentheses refer to pages of the trial transcript. Trial witnesses are indicated by underscoring at the first mention of their testimony.

check from the mailbox and returned to the car, and while in the car, signed the check "Giosebdina Scala" (T.33). The two women then proceeded to a grocery store, Friendly Corner, where appellant Meyers, who knew the proprietor, entered the store for the purpose of cashing the check (T.34). Mrs. Chiarello did not know how much money appellant received for the check, but she was given a portion of the proceeds "for signing the check" (T.35).

Mrs. Chiarello testified to a number of similar thefts in which appellant Meyers was involved. On November 13, 1975, Mrs. Chiarello, entering her mother-in-law's (appellant's mother's) building, noticed a check near but not within a mailbox, and appropriated this check (T.36). She endorsed this check with the name on its face ("A. Walowitz") and later gave the check to appellant (T.41, 43). She subsequently received \$70, half the proceeds, when appellant cashed the check at a Key Food Store (T.42, 57). She did not recall whether she had told appellant Meyers that this check was stolen (T.43). On January 3, 1976, Mrs. Chiarello stole a check payable to "Jacob Flusberg" and signed his name; appellant, who was waiting in her car, cashed it as before (T.43-48). This procedure was followed with regard to a check payable to a "Frances Loftman" as well as two or three unspecified persons, all occurring during December and January (T.48-50). Appellant Meyers was charged with none of these thefts and conversions; Mrs. Chiarello was prosecuted for only the theft of the check payable to Jacob

Flusberg (T.29).*

To that charge, Mrs. Chiarllo pleaded guilty on June 24, 1976, nearly five months prior to her testimony in this case (T.82). Her sentence had been postponed pending her testimony in this case against Barbara Meyers (T.83).** Mrs. Chiarello was a drug addict and was participating in a methadone program at the time of this trial (T.54).

Frank Indelicato, the owner of the grocery store at which appellant cashed the stolen checks, knew appellant as a customer and cashed the check in question because appellant told him it was her aunt's check (T.110). He was introduced to Mrs. Chiarllo by appellant Meyers, and Mrs. Chiarello had been in his store a few times; however, appellant was alone on the date she gave Mr. Indelicato the Scala check (T.113-114, 117).

Robert Klaus, a United States Postal Inspector, advised appellant Meyers of her rights and interrogated her on March

*Upon application of the defense, Mrs. Chiarello's statement to the investigating Government agents was admitted in evidence (T.80). In that statement, she detailed several of her thefts of checks and her signing of the payee's name, and stated that she gave the checks to Barbara Meyers and received money in return (T.87-88). Her statement was directed by the agent, who told her what matters to address and supplied various details for her statement (T.64). She thought the agents asked her if appellant had accompanied her when she stole the check, but her statement did not reflect that appellant Meyers was present (T.71, 87).

**The Government requested these postponements (T.83). Mrs. Chiarello understood that her cooperation in this case would be taken into account at her sentencing (T.85). On information and belief, Mrs. Chiarello was sentenced by Judge Pratt (the presiding judge in this case) to a term of probation.

10, 1976, at her home, at which time she admitted having received the check from her sister-in-law and having cashed it (T.127, 130). As an accommodation to appellant Meyers, Inspector Klaus adjourned the interview until the next day, when appellant appeared as requested at the Post Office and was again advised of her rights (T.130). She was then questioned for approximately three hours, and after appellant acknowledged that she had obtained the check from Mrs. Chiarello and cashed it at Mr. Indelicato's grocery store, Inspector Klaus sought a written statement (T.132, 134):

My practice of doing it is that I tell the individual that I would now like to take a written statement, that I will direct the conversation if there is anything that I say or indicate that may not be the truth or may be wrong in any manner, that she should correct me. That this is her statement and at the end of it I will have to swear her to it.

I then proceed to tell the story of what happened. Of course making sure I am in fact going along with the story that the individual gives me.

. . . .

[I]n the statement I try to cover the facts that are needed in my investigation.

The statement was obtained in appellant's handwriting, but the inspector's hand in "directing" the statement was apparent in the details (T.158, 160-161).

Appellant's statement was read to the jury (T.137-138):

On or about 1/24/74 I got a Blue Shield Check #3849886 dated 10/18/73 in the amount of \$115 payable to Vincent Buonomo, 211 Bay 11th Street, Brooklyn, New York. From a guy

who I thought was Vincent Buonomo, the check had not been signed so when I cashed the check at Bonvis Enterprises at the corner of New Utrecht Avenue and 76th Street I signed Vincent's name to the check.

On or about 12/3/75 my sister-in-law Donna Chiarello came to my house with United States Treasury Check #59449875 dated 12/3/75 in the amount of \$164.90 payable to Giosbdina Scala, 6682 17th Avenue in Brooklyn, New York.

She wanted to know if I know someone who could cash the check. At that time I know the check is stolen, I took her to a store called Friendly Corner on New Utrecht Avenue, Brooklyn, New York where she cashed that check.

I got no money from this check. On several occasions I would meet Donna at which time she would have several checks in her possession, there was about six checks I helped her cash.

I know the checks were stolen from the mail, I helped Donna Chiarello cash checks at Friendly Corners and Bensonhurst Meat Market on 13th Avenue in Brooklyn, New York.

On direct examination, the inspector confirmed that appellant used "know" rather than "knew" -- present rather than past tense -- in describing her knowledge of the checks' illegality (T.139). In relating the details of the prior day's interview, Inspector Klaus initially stated that appellant Meyers had admitted cashing the check but no mention was made of her knowledge of the check's origin (T.130); only after the question of appellant's contemporaneous knowledge that the checks were stolen had been raised did the inspector testify that appellant stated "that she cashed the check knowing it to be stolen" (T. 145).

2. The Defense Case

Appellant Barbara Meyers cashed the check in question for her sister-in-law, Mrs. Chiarello, on December 3, 1975, at Mr. Indelicato's grocery, Friendly Corner. When she did so, she believed that check had been given to Mrs. Chiarello by her aunt, whose last name, like that on the check, was Scala (T.197-198). Mrs. Chiarello did not tell her that that check was stolen (T.198); she said she had received the check from Aunt Mary (T.223). Appellant did not drive with Mrs. Chiarello to locate Social Security checks, nor was she the person who told Mrs. Chiarello that Social Security checks arrived on the third of each month (T.198). Mrs. Chiarello did not endorse the check in her presence (T.199), and until Mr. Indelicato called her a month later to inform her that the check had been returned as stolen, she was under the impression that the check had been legally obtained from her aunt (T.199-202). Her use of the present tense ("know") in her statement to Inspector Klaus was intentional; her knowledge that the check was stolen dated from Mr. Indelicato's telephone call, so she was indicating only her present knowledge -- at the time she made the statement -- and not her past state of mind -- at the time she cashed the check (T.205, 213).

The Scala check was the first appellant received from Mrs. Chiarello; she denied having been given a check in her mother's apartment on November 13, 1975, as claimed by Mrs. Chiarello in her testimony, and appellant's statement to Inspector Klaus made

no reference to such a transaction (T.137-138, 196). She did not deny cashing the other checks mentioned by Mrs. Chiarello, and she acknowledged that as to those, she knew they were stolen when she cashed them because Mrs. Chiarello had so informed her (T.202-203). The first of these transactions occurred on January 3, 1976 (T.202-203). Appellant cashed the checks for her sister-in-law out of pity; she knew of her drug dependence and her need for money (T.203, 221). But appellant did not drive with Mrs. Chiarello looking for checks to steal; and though Mrs. Chiarello, who was living in appellant's home on an irregular basis, used a portion of the money to buy groceries for the house, appellant herself received no money from these illegal transactions (T.202-203, 222). Appellant had previously been convicted of the misdemeanor of possession of stolen property in New York (T.217). That conviction was elicited solely for impeachment purposes pursuant to F.R.Ev. 609 (T.187, 191).

Appellant did not seek a hearing or file a motion to suppress with regard to her statement to Inspector Klaus,* but she did allege facts pertinent to the statement's voluntariness and sought to have the question of voluntariness submitted to the jury. Counsel requested (T;103-104):

I think it would go to the question of voluntariness and also to the weight to be given to the statement [de]pending on the circumstance to which it was taken, and I think that is an issue for the jury.

*A separate suppression hearing on the admissibility of the statement was expressly waived by counsel (T.103).

Appellant's chief contentions regarding the surrounding circumstances related to the length of time (approximately six hours) that she was in custody when the statement was taken, her own mental state due to nervousness, and two aspects of Inspector Klaus's conduct during the interrogation -- regarding her request for an attorney and the manner in which the statement was written (T.207-214). Though appellant had been advised of her right to counsel at the outset of her questioning, she stated that during the questioning she requested an attorney and the inspector "said if you want an attorney what are you guilty?" (T.209-210). As to the writing of the statement, appellant's account of the process conformed with Inspector Klaus's testimony; for two or three hours, they worked over the statement sentence by sentence, with the inspector advising her what was to be contained in the statement (T.211-213). At one point, Inspector Klaus told appellant to write a statement concerning her knowledge when she cashed the Scala check, and she did so by indicating her present knowledge that the check had been stolen (T.213). At no time did appellant contend or suggest that her statement had been obtained through violence or threats of violence.

B. The Prosecutor's Conduct

1. Statements During the Trial

During cross-examination of Inspector Klaus, counsel had

inquired whether, during his interrogation of appellant, the inspector had sought to insure that appellant made a statement about her knowledge; Inspector Klaus acknowledged that he had (T.163). On re-direct examination, the prosecutor framed the following statement in a question (T.169):

Q. I ask you, sir, you testified you're familiar with the United States Code and training and pursuant to the question asked by Mr. Levitt, you had full knowledge of at least the postal division of the United States Code.

I ask you and direct your attention to the United States Code, Title 18, Section 1708. I ask you to look at that statute, or based upon your independent knowledge, is it not a fact, sir, that knowledge was not an element required in this case?

Counsel's objection was sustained as to both form and substance of the question (T.169-170); in the colloquy, the prosecutor conceded that knowledge was an element of the crime* and proceeded to "rephrase" his question (T.170-171):

Q. Mr. Klaus, Donna Chiarello was charged was she not with stealing a United States Treasury check is that not a fact, sir?

A. Correct.

Q. And you were the investigator on that particular case?

A. Correct.

Q. Is it not a fact, sir, that [appellant] Barbara

*The prosecutor reiterated his erroneous belief that appellant's knowledge at the time the check was negotiated was not a necessary element during the requests-to-charge colloquy (T. 176-177).

Meyers could have been charged if the United States Government so desired to aiding and abetting theft?

[Objection sustained.]

Q. Based upon the facts set forth in Mrs. Meyers' statement, did she not admit to uttering forged instruments?

[Objection sustained.]

2. The Summation

During his summation, the prosecutor made a number of comments calculated to impress upon the jury that Mrs. Meyers was a liar and the defense disingenuous. Charging, as he had in his opening remarks, that "all the defense did in this case was throw out smokescreen after smokescreen after smokescreen" (T.231), he attempted to document that claim with exaggerations and misstatements.

Against appellant herself, the prosecutor asserted that she had "the only motive to lie in this case" (emphasis supplied) (T.245). This "only motive" comment was later tied in with appellant's prior misdemeanor conviction (T.252):

A person is involved in possession of stolen property who is convicted of it as recently as April 1976, is she to be believed? Is the same person who has the only motive in this case to lie, the defendant, is that person to be believed....

Other comments, though purportedly relating to credibility, sought to demonstrate that appellant had a propensity to steal (T.297):

This business of possessing stolen property is not new in the sense that we have

shown she has been involved with other checks. In fact solely as it bears on her credibility we have shown cross-examination, she was convicted on April 5, 1976 of criminal possession of stolen property....

The prosecutor also vouched for the quality of the Government's proof establishing appellant to be of a criminal character (T. 250):

If that [not signing checks she cashed for Mrs. Chiarello] is not the best evidence of a criminal mind, criminal intent, or common scheme and plan in this case, I don't think the United States Attorney can bring it to you for your consideration any better evidence.

Against appellant's defense, the prosecutor mounted an attack based on the false premise that appellant had contended that her statement was obtained through violence. (The defense had made no such claim.)

... [T]his is the action of a coercive, or police brutality, of a man that sees there are a couple of children in the house and says to her well, come down tomorrow to the United States Post Office in Brooklyn, New York and we'll talk about it then.

That is brutal ladies and gentlemen of the jury, that is what you see on television, that is what you hear about police brutality. She wants you to believe that's what happened in this case.

(T.247-248).

Well, the idea I submit on cross-examination of Inspector Klaus was to try to make the jury think that this was an involuntary statement punched out of her, or at least put that idea into your head.

(T.252-253).

C. The Court's Charge

Before the court began its charge, counsel requested that a recess be declared and the jury charged the following morning. This request was made in the late afternoon of November 18, 1976; on that date, the testimony of Frank Indelicato, Robert Klaus, and appellant Barbara Meyers had been presented and both summations heard, and counsel believed that, were the jurors to begin their deliberations the next day (November 19), after being charged that night (November 18), their understanding of the applicable law would suffer (T.300). Nevertheless, the court decided to charge the jury immediately, and when the jurors expressed their preference for beginning their deliberations in the morning, the court acceded to this request (T.301). At the conclusion of the charge, neither the prosecutor nor defense counsel registered any exceptions.

Neither attorney appeared to notice that the court, in the middle of its charge, began discussing testimony which was never presented in the case. Having concluded a charge on the use of similar act evidence, the court detailed the testimony of a Mr. "DiMicchio" or "DiMitrio" and then discussed the "conspiracy" with which appellant was charged (T.318-319):

If the jury should find beyond a reasonable doubt from the evidence in the case that the accused did the act charged in the indictment, then the jury may consider the evidence as to an alleged earlier offense of a like nature, in determining the state of mind with which the accused did the act charged in the indictment.

There was testimony by Mr. "DiMicchio" that he had engaged in certain transactions with the defendant in 1972 and 1973 and prior to the events charged in the indictment. Mr. "DiMitrio" also testified to statements by the defendant after "DiMitrio's" arrest and while he was cooperating with the Government. These acts and statements are not to be taken by you as evidence of a crime. But, if you believe this testimony, and if you find the Government has established that the defendant performed those acts, or made those statements, and if you find that they were similar to acts at issue here, then you may use the testimony of those similar acts to help you determine whether the defendant's acts relating to the charge in this indictment were knowingly or willfully performed by the defendant, or [whether] they were innocently performed.

However, the defendant is here only to defend the charge in this indictment which alleges conspiracy between 8/5/74 and 3/10/75 and in addition 9/9/74 and 3/10/75. It would be improper for you to convict her of a crime not charged in this indictment. Therefore, do not concern yourself with any possible criminal consequences of the 1972-73 events or the discussion with Mr. "DiMitrio" after the time of his arrest on 4/11/75[*].

The court did not conclude in its charge a number of instructions on matters which were in issue primarily because of various comments by the prosecutor. (1) Despite the evidence that Mrs. Chiarello alone performed several criminal actions and the prosecutor's argument that appellant could be convicted

*Appellate counsel has endeavored to confirm the accuracy of this portion of the transcript, but the court reporter, Mr. Steven Tessler, has moved to Florida and left the profession of stenographer, and we have been advised by the office of the court reporters that Mr. Tessler is not accessible. We have found no basis for concluding that this portion of the charge was inaccurately transcribed.

without proof of knowledge as an aider or abettor, the court gave no instruction on the definition and requirements of aiding and abetting. (2) The court gave a full charge on a criminal defendant's interest as a witness -- referring to it as a "deep personal interest" and "the greatest interest" and "of a character possessed by no other witness" -- and advised the jury that this interest "creates a motive for false testimony" (T.326); but the court failed to explain that interest was a factor which might afflict the testimony of any witness and that the jury could find that other witnesses in the case had an interest in testifying as they did. (3) The court gave a similar act instruction (T.316-318) which informed the jury that evidence of prior crimes could be used to determine state of mind; but the court did not instruct the jury that evidence of a prior unrelated crime not admitted as a prior similar act, such as appellant's conviction for possession of stolen property as a misdemeanor (T.181-189), could be used only to evaluate credibility and not substantively. (4) The court, in its charge on determining the voluntariness of appellant's statement (T.327-328), failed to give any definition of "voluntary" or explanation of the type of conduct which renders a statement involuntary, and failed to instruct the jurors that they were to give such weight to the statement as they deemed appropriate.*

*The instruction on the statement's voluntariness was (T. 327-328):

If the evidence in the case does not convince

D. Verdict and Sentence

The jurors began their deliberations at 9:30 a.m. on November 19, 1976, and reached a verdict in the late afternoon. Appellant was found guilty of possessing the stolen Scala check.

Appellant Meyers was sentenced on January 28, 1977. The court imposed a three-year term of imprisonment; three months of the sentence were to be served in a jail-type or treatment institution, the remainder of the sentence was suspended, and appellant was placed on probation for a period of four years to commence upon her release from confinement (Sentencing Minutes at 6).

(Footnote continued from the preceding page)

beyond a reasonable doubt that a statement was made voluntarily and intentionally you should disregard it entirely. On the other hand, if the evidence in the case does show beyond a reasonable doubt that a statement was in fact voluntarily and intentionally made by the defendant, you may consider it as evidence in the case against the defendant who voluntarily and intentionally made the statement.

The only additional instruction relating to this issue pertained to the Miranda warnings (T.327); in an obvious transcription lapse, that portion of the instruction relating to the first warning is deleted, but we assume that the court's instruction on this point was accurate.

ARGUMENT

Point I

THE INCLUSION IN THE COURT'S CHARGE OF EXTRANEOUS MATERIAL PERTAINING TO SOME OTHER CRIMINAL PROSECUTION PREJUDICED APPELLANT BY IMPLYING HER INVOLVEMENT IN ADDITIONAL CRIMINAL PROCEEDINGS NOT DISCLOSED TO THE JURY.

In the very middle of its charge, the court inexplicably marshalled the testimony of a witness who had not testified in this case and referred to a conspiracy with which this defendant was never charged. Had the court's extraneous comments dealt with inconsequential matters or had they explicitly been addressed to another criminal defendant, they might have been excusable as harmless oversight. But these comments were the only factual illustrations following a lengthy explanation of the use of similar act testimony and concerned allegations of similar criminal transactions in 1972 and 1973; and the perpetrator was addressed as "the defendant" rather than any proper name which would have excluded appellant. The jury may have been led to believe that appellant not only faced conspiracy charges in a related prosecution but had prior similar crimes which had not been disclosed at the trial proper.

Despite the great leeway given a district judge in summarizing and commenting upon the evidence, he may not advance his own facts (see United States v. Tourine, 428 F.2d 865, 869

(2d Cir. 1970), cert. denied sub nom. Burtman v. United States, 400 U.S. 1020 (1971)), and he should state the facts with accuracy (see United States v. Kahaner, 317 F.2d 459, 479 (2d Cir.), cert. denied sub nom. Keogh v. United States, 375 U.S. 836 (1963)). A trial court's inaccurate statement as to the crime with which the defendant was charged was criticized because it "may well have hopelessly confused the jury" in United States v. Bagby, 451 F.2d 920, 928 (9th Cir. 1971). See also Mann v. United States, 319 F.2d 404 (5th Cir. 1963), cert. denied, 375 U.S. 986 (1964). Moreover, the fact that in another portion of the charge the information is provided correctly does not obviate the error, since it is impossible to determine the effect of the mistaken statement, and reversal is warranted unless it is certain that there has been no prejudice. See United States v. Reid, 517 F.2d 953, 965 (2d Cir. 1975); United States v. Christmann, 298 F.2d 651 (2d Cir. 1962); Nicola v. United States, 72 F.2d 780, 787 (3d Cir. 1934).

Applying these principles to the case at bar, the propriety of ordering a new trial is manifest. The Government's similar act evidence, with one questionable exception, pertained to conduct subsequent to the transaction in issue. But these similar acts were not determinative of appellant's knowledge in December 1975; her defense was that she acquired knowledge of the illegal means by which Mrs. Chiarello obtained the checks only after January 1976. Thus, the court's suggestion that there were similar acts in 1972 and 1973 -- though obviously a mistake,

the unspecified acts of 1972 and 1973 were offered to the jury as "similar acts" -- might have been viewed by the jurors as the only preceding similar act evidence, and as such, the only proof that appellant actually possessed knowledge in December 1975. Furthermore, the mere fact that the jurors were informed that appellant had committed previously undisclosed crimes in the past and might presently be facing an independent conspiracy charge may have prejudiced them against appellant. While they were free to conclude that the court's comments were simply a mix-up of cases, they might also have concluded that these remarks pertained to appellant, and it is now impossible to determine which interpretation they chose. Cf. United States v. Reid, supra, 517 F.2d at 965.

It is remarkable that neither defense counsel nor the Government prosecutor brought this error to the court's attention at the conclusion of the charge. Perhaps the exhaustion counsel attributed to the jury when the charge was given in the late afternoon described his own state;* he failed to request any of the charges noted in Point II, infra, and took no exceptions. Since the trial court's inclusion of this extraneous material in its charge prejudiced appellant's right to a fair trial, counsel's inexcusable neglect should not bar a new trial (cf. United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972); F.R.Cr.P. 52(b)).

*The defense counsel suggested his own exhaustion after so full a day of testimony and summation when he urged the court to delay the charge until the next morning.

Point II

THE JURY WAS MISAPPRISED ON THE REQUIREMENT OF KNOWLEDGE, THE ASSESSMENT OF APPELLANT'S TRUTHFULNESS, THE LIMITED USE OF OTHER CRIMES EVIDENCE, AND THE STANDARD OF VOLUNTARINESS APPLICABLE TO APPELLANT'S STATEMENT, BY THE PROSECUTOR'S EXAGGERATIONS AND MISSTATEMENTS, AND BY CORRESPONDING DEFICIENCIES IN THE COURT'S CHARGE.

Two interlocking influences prevented the jury from deliberating impartially on the evidence presented: the prosecutor's misstatements and improper comments and the court's failure to charge on several matters particularly relevant in light of the prosecutor's remarks. These errors affected appellant's most substantial rights: the prosecutor's distortions of several key issues constituted "improper methods calculated to produce wrongful conviction" (Berger v. United States, 295 U.S. 78, 88 (1935); see United States v. Drummond, 481 F.2d 62, 64 (2d Cir. 1973)); and the court, by failing to instruct the jurors on several matters, neglected its "responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria" (Bollenbach v. United States, 326 U.S. 607, 612 (1946); see United States v. Persico, 349 F.2d 6, 8 (2d Cir. 1965)). Consequently, appellant was deprived of a fair trial and, despite the inexcusable absence of objection to several of these errors, she should be accorded a new trial.

A. Re: The Requirement of Knowledge

The existence of appellant's knowledge that the check was stolen was the one important factual question contested below. It was essential, therefore, that the jury have a clear and accurate understanding of the element of knowledge: that appellant had to have been aware that the check was stolen at the time she presented it to Mr. Indelicato.

The prosecutor confused this matter irreparably by advising the jury, in the course of a question to Inspector Klaus, "that knowledge was not an element required in this case." After counsel's objection was sustained, the prosecutor posed two further "questions" -- objections to both were sustained -- indicating that appellant Meyers could have been charged "if the United States Government so desired" with "aiding and abetting theft" and that appellant had admitted the crime of "uttering forged instruments;" and the implication of both statements was that knowledge was not necessary for conviction. These misstatements, particularly the first, direct assertion that knowledge was not essential to a guilty verdict, are directly in conflict with the stated requirements of 18 U.S.C. §1708, ¶3, that the alleged possessor must possess the postal material "knowing the same to have been stolen...." As Chief Judge Bazelon remarked in a similar context:

If counsel's view of the applicable law differs from that of the court, then of course there is great danger of confusion. In that case the jury should hear a single

statement of the law, from the court and not from counsel.

United States v. Sawyer, 443 F.2d 712, 714 (D.C. Cir. 1971).

Here, the prosecutor's comment was not ambiguous; it was not responsive to a defense misstatement; and it was not arguably correct. Moreover, it bore on the single most important question in the case, and the court's charge on the requirement of knowledge, though correct, could not erase the likelihood of prejudice under these circumstances. Cf. United States v. Nasta, 398 F.2d 283, 285 (2d Cir. 1968) .

Furthermore, notwithstanding any ameliorative effects of the court's charge on knowledge, its failure to define "aiding and abetting" -- a concept the prosecutor had injected during his questioning of Inspector Klaus -- left the jury uninformed as to the knowledge requirement applicable under that theory. The prosecutor's comment, as noted, followed immediately his assertion that knowledge was not required for conviction, and it implied that appellant Meyers could have been prosecuted as an aider and abettor without any requirement of knowledge. Without benefit of an explanation of the knowledge requirement of aiding and abetting, the jury could have taken the prosecutor's lead and erroneously concluded that cashing the check for Mrs. Chiarello constituted the type of aid which proved appellant guilty regardless of her knowledge. Cf. Moore v. United States, 356 F.2d 39, 43 (5th Cir. 1966); United States v. Garguilo, 310 F.2d 249, 254 (2d Cir. 1962). Though an aid-

ing and abetting theory of criminal liability was not incorporated in the indictment or added to the charge at the Government's request, the prosecutor's comment placed it before the jury, cf. Sultan v. United States, 249 F.2d 385, 388 (5th Cir. 1957), and clarification of the knowledge requirement for aiding and abetting was necessary in light of the prosecutor's misstatement of the law. See United States v. Terrell, 474 F.2d 872, 876 n.2 (2d Cir. 1973); United States v. Byrd, 352 F.2d 570, 576 (2d Cir. 1965).

While the court's failure to give this charge does not itself constitute plain error (United States v. Ramsey, 374 F.2d 192, 196 (2d Cir. 1967); but see F, infra), such a charge becomes necessary when the prosecutor misstates the requirement of knowledge and misleads the jury. Because these comments reached the jury without full corrective instructions, their impact must be recognized as substantial.

B. Re: Appellant's Interest as a Witness

It is beyond cavil that a criminal defendant is an interested witness, and this fact may be brought to the jury's attention. See, e.g., United States v. Sullivan, 329 F.2d 755, 757 (2d Cir.), cert. denied, 377 U.S. 1005 (1964). But a defendant is not necessarily the only interested witness; a testifying accomplice is one of many categories of witnesses who is susceptible to attack for interest. See United States v. Gonzalez-Carta, 419 F.2d 548, 551 (2d Cir. 1969); see also

Cash v. Culver, 358 U.S. 633, 637-638 (1959); see generally United States v. Harvey, 547 F.2d 720, 722-723 (2d Cir. 1976); United States v. Stassi, 544 F.2d 579, 584 (2d Cir. 1976).

Here, Mrs. Chiarello's sentencing had been adjourned for five months so that she could testify here, a fact which she understood to be to her benefit in sentencing. It was for the jury to determine whether her testimony against appellant was tainted by her own interest. United States v. Gonzalez-Carta, supra.

This jury was denied that privilege. The prosecutor, on two distinct occasions in summation, advised the jury that appellant had "the only motive to lie in the case" (emphasis supplied). This erroneous statement led the jurors to consider the effect of appellant's interest while disregarding that aspect of Mrs. Chiarello's testimony. The confusion fostered by the prosecutor's misrepresentation was exacerbated by the court, which charged that appellant had a great interest and a motive to lie, but failed to instruct that interest was a matter which could be considered when evaluating the testimony of any other witness (cf. United States v. Frank, 494 F.2d 145, 158-160 (2d Cir.), cert. denied, 419 U.S. 928 (1974); United States v. Kelly, 349 F.2d 720, 767-768 (2d Cir. 1965)). A general interest charge would have been particularly appropriate here because the court's detailed instruction on appellant's interest was so strongly worded. Though the court gave a sound accomplice testimony charge (T.324-325) and alluded in passing to "motive and state of mind" as one of numerous factors to be

considered (T.321), its specific charge on interest directed exclusively at appellant gave implicit approval of the prosecutor's assertion that appellant was the only interested witness. Not only did Mrs. Chiarello's testimony -- in anticipation of which her sentence had been delayed for five months -- escape scrutiny on interest grounds, but appellant's testimony suffered from the suggestion "that [s]he is more likely to lie than other witnesses [which] is to be avoided." United States v. Howard, 433 F.2d 505, 512 (2d Cir. 1970).

C. Re: Appellant's Propensity

Appellant's prior New York conviction for possession of stolen property was admitted in evidence upon her testimony for impeachment purposes. The prosecutor used it, however, to show appellant's propensity to commit larceny.

The prosecutor, despite his framing of his remarks in terms of credibility, created the impression that appellant's prior conviction was tied in with this case by discussing the conviction in conjunction with the similar act evidence:*

This business of possessing stolen property is not new in the sense that we have shown she has been involved with other checks. In fact, solely as it bears on her credibility, we have shown cross-examination, she was convicted on April 5, 1976 of criminal possession of stolen property....

*There was no attempt to offer this crime as a prior similar act bearing on appellant's knowledge or intent, nor does the record provide any basis for concluding that this conviction would so qualify.

While this remark might have been corrected by a proper charge that relevance of prior crimes evidence was limited to credibility and could not be used to find a predisposition to larceny, no such charge appears; the court charged only on similar act evidence and advised the jury that proof of prior crimes could be addressed to determine appellant's state of mind. In United States v. Gregory, 472 F.2d 484, 488-489 (5th Cir. 1973), the Fifth Circuit held in an analogous situation that the omission of a clarifying instruction was plain error:

The court failed to instruct the jury that the impeaching statement could be taken only as evidence of credibility and not as affirmative evidence. The Government points out in its brief that no such instruction was requested. The Government also urges that juries cannot understand such a distinction, and that a failure to explain it to a jury cannot therefore be harmful. This Court, however, has strongly adhered to the position that the distinction between statements used to destroy credibility and those used to establish affirmative facts "should be delineated sharply in terms readily understandable by the jury." [Citations omitted.]

Cf. United States v. Cisneros, 491 F.2d 1068, 1077 (5th Cir. 1974). Here, too, the court's failure to correct the misimpression created by the prosecutor that appellant's prior conviction was proof of this crime should be deemed plain error.

D. Re: The Voluntariness of Appellant's Statement

Appellant's contention as to the voluntariness of her statement to Inspector Klaus was rather limited; she contended that the inspector, who all but put the words into her mouth,

was overbearing, that she was extremely upset, and that therefore her statement was obtained forcibly rather than freely. The jurors should have been free to consider this claim as advanced. 18 U.S.C. §3501.

In his summation, however, the prosecutor thoroughly distorted appellant's claim so as to make it appear ridiculous and to place it beneath the jury's attention. Though appellant never remotely suggested that Inspector Klaus threatened her with physical violence, the prosecutor attributed to the defense the intention of claiming "that this was an involuntary statement punched out of her" and said that appellant "wants you to believe that [police brutality] is what happened in this case." These blatant misrepresentations had no basis in fact and were beyond the permissible limits of argument on appellant's statement. Cf. United States v. DeAngelis, 490 F.2d 1004, 1008 (2d Cir.), cert. denied, 416 U.S. 956 (1974).

The damage of these statements was increased by the court's failure to deliver a charge on the meaning of voluntariness. The jury was left with the impression that a statement could be disregarded as involuntary only if it was obtained through actual physical violence; thus, they were not prepared to consider appellant's particular claim of involuntariness. Since a charge adequate to acquaint the jury with the concept of voluntariness under the circumstances of a particular case is obligatory (United States v. Barry, 518 F.2d 342, 345-348 (2d Cir. 1975); 18 U.S.C. §3501(a); cf. United States v. Lucchetti, 533 F.2d 28,

38-40 (2d Cir.), cert. denied, 429 U.S. 849 (1976)), the court below committed plain error in failing to instruct the jurors on the meaning of voluntariness so as to correct the false impression created by the prosecutor; for without such an instruction, the jurors' consideration of voluntariness could reach no further than the arbitrary limits set by the prosecutor, and under the facts at bar, that amounted to no consideration whatsoever. See United States v. Barry, supra, 518 F.2d at 348.

The court's voluntariness charge also failed to advise the jurors that they were to give such weight to the statement as they felt it deserved under all the circumstances; instead, the court instructed the jury to use it as evidence against appellant if it were found to be voluntary. The important distinction between these two instructions is that the former allows more flexibility in the jury's assessment of the statement, while the latter rigidly requires all or nothing; and in this case, where the prosecutor's assertions made a mockery of the claims of appellant, the jury was apt to choose the "all." 18 U.S.C. §3501(a) mandates that the former charge be given: "[T]he trial judge ... shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." (Emphasis supplied.) As this Court noted in United States v. Barry, supra, 518 F.2d at 345-347, "The statute's unambiguous language is bolstered by the legislative history of §3501." In the Report of the Senate Committee on the Judiciary, 1968 U.S. Code Cong. & Admin. News, the committee concluded:

"There is the added safeguard that the jury must be instructed to give the confession or statement the weight that they feel it warrants under all the circumstances" (emphasis supplied), id. at 2137. Had the required charge been given here, the jury would have been in a position to consider the effect of appellant's non-violent voluntariness claims on the statement's accuracy and reliability; without this charge, the jury had no choice but to ignore these claims which failed to allege violent coercion. Counsel's initial request that the statement's voluntariness be submitted to the jury was framed in proper language: "I think it would go to the question of voluntariness and also to the weight to be given to the statement [de]pending on the circumstance to which it was taken, and I think that is an issue for the jury" (T.103-104). However, even if it is not deemed a satisfactory request to charge, the court's failure to so charge, as noted in United States v. Barry, supra, 518 F.2d at 347, was plain error.

E. Re: Vouching for the Government's Case

Commenting on the essentially ambiguous fact that appellant did not sign the checks she cashed for Mrs. Chiarello, the prosecutor announced:

If that is not the best evidence of a criminal mind, criminal intent, or common scheme or plan in this case, I don't think the United States Attorney can bring it to you for your consideration any better evidence.

This statement is the functional equivalent of the prosecutor's

statement condemned by this Court in United States v. Grunberger, 431 F.2d 1062, 1068-1069 (2d Cir. 1970):

I don't know of a case where the evidence has been as strong as it has been in this case to establish the guilt of any defendant.

Id. at 1068.

This Court's remarks regarding the Grunberger statement apply with equal weight here:

If the jury believed that the prosecutor was an experienced one and knew about a lot of cases, they were left with no alternative but to believe the Government's witness, Berger. The remark was not merely an averment of a personal belief in Grunberger's guilt based on the evidence adduced at Grunberger's trial; it was a statement of belief that the jury was expected to understand came from the prosecutor's personal knowledge of, and from the prosecutor's prior experience with, other defendants, and as such he was speaking as an expert based upon matters outside the record. That the remark was improper is beyond dispute. [Citations omitted.]

Id. at 1068.

Additionally, this Court found excusable the failure to register an objection to this comment, and again, the analysis is applicable to the case at bar:

While it is true that failure to object to like remarks has sometimes constituted a waiver of the point [citations omitted], it is understandable that a defense counsel may wish to avoid underscoring a prejudicial remark in the minds of the jury by drawing attention to it.

Id. at 1068-1069.

The prosecutor's statement in the case at bar, therefore, constituted plain error. See also United States v. White, 324

F.2d 814, 816 (2d Cir. 1963).

F. Prejudice and Preservation of Issues

That these errors were prejudicial is initially evident from their extraordinary range: the sole issue of contention -- knowledge -- was obscured; the only witness for the defense -- appellant -- was unfairly challenged on both propensity and interest grounds while the Government's case against her was improperly bolstered; and possibly the single most important piece of Government evidence -- appellant's statement -- was effectively exempted from assessment under the voluntariness standard to which it was subject. No important aspect of this case escaped the prosecutor's improper comment or the court's failure to charge.

The prejudice is also evident from the quality of evidence presented by the Government. As to Mrs. Chiarello's pro-Government account, she was well aware that her sentence would be influenced by her performance, and her interest in testifying as she did was strong. As to appellant's statement to Inspector Klaus, it failed to establish the one question in the case -- knowledge -- by reason of appellant's use of "I know" rather than "I knew." If not for the improper arguments of the prosecutor and the court's deficient instructions, the jury might well have found the Government's proof to be insubstantial.

Admittedly, only a few of the defects addressed were brought to the attention of the trial court by exception or request to

charge.* Nevertheless, as appropriately noted, several of these unexcepted to errors have been regarded by this and other courts as plain error.** Additionally, a number of the errors raised should, under the facts at bar, be deemed plain error because they affected appellant's substantial rights.*** F.R.Cr.P. 52(b); see Screws v. United States, 325 U.S. 91, 107 (1944). But beyond this, the cumulative effect of all these errors affected appellant's right to a fair trial to such an extent as to constitute, jointly, plain error. See, e.g., United States v. Clark, 475 F.2d 240, 250 (2d Cir. 1973); United States v. Semensohn, 421 F.2d 1206, 1210 (2d Cir. 1970).

Under all the circumstances present, the errors addressed in this point demonstrate that appellant's right to a fair

*Counsel objected to the prosecutor's suggestion that knowledge was not an element and that appellant had admitted guilt under the theory of aiding and abetting (A, supra). Counsel also requested that the question of voluntariness be submitted to the jury and that the jury be permitted to determine the appropriate weight to give to the statement (D, supra). Counsel did not object to any of the prosecutor's summation arguments, nor did he except to the court's failure to charge on the matters raised in the balance of this point.

**Those errors which have been regarded as plain error include the court's failure to charge on the application of voluntariness requirements (D, supra), the court's failure to charge that appellant's prior criminal conviction could be used for impeachment purposes alone (C, supra), and the prosecutor's vouching for the Government's evidence as the "best evidence of a criminal mind ... the United States Attorney can bring" (E, supra).

***Those we submit constitute plain error, in addition to those previously listed, are the prosecutor's two inaccurate and seriously misleading statements of law, first that knowledge was not an element of the crime charged (A, supra), and second that appellant was the only interested witness (B, supra).

trial was seriously compromised. The judgment should be reversed and appellant accorded a new trial.*

*We note that the prosecutor, formerly an Assistant United States Attorney for the Eastern District of New York, has been criticized by this Court on at least two prior occasions. In United States v. Steven Hyatt, ___ F.2d ___, Docket No. 77-1294, slip op. 177 (November 1, 1977), this Court first commented: "We are not unmindful of the then Assistant U.S. Attorney's improper behavior in unilaterally terminating Hyatt's interview with the informant.... Thus the prosecutor's attitude and actions, while objectionable, were not prejudicial in the context of this case." Id., slip op. at 182. Later in the opinion, on another issue, the Court remarked: "While this line of questioning [by the prosecutor] was both irrelevant to the proof at trial and prejudicial, we are not prepared to hold that it was sufficiently damaging, given the length of the trial and the relative paucity of offending material, to require reversal. This is not to indicate, however, that we condone this kind of behavior on the part of the prosecuting attorney. As an officer of the court, he is responsible for the fair and impartial exercise of his duties." Id., slip op. at 185. Additionally, in United States v. Jose Nunez, ___ F.2d ___, Docket No. 77-1123 (2d Cir., June 23, 1977), the misconduct of this former Assistant was advanced as grounds for reversal. That case was affirmed in open court, and though appellate counsel's efforts to obtain a transcript of this Court's oral decision have thus far been unsuccessful, it is our recollection that Judge Mulligan was critical of the prosecutor's behavior but found it not to warrant reversal on the facts of that case.

Point III

THE MAXIMUM PROBATION PERIOD IMPOS-
ABLE ON A SPLIT SENTENCE UNDER 18
U.S.C. §3651 MAY NOT EXCEED THE
LENGTH OF THAT PORTION OF THE ORI-
GINAL SENTENCE WHICH HAS BEEN SUS-
PENDED BY THE COURT; CONSEQUENTLY,
APPELLANT'S PROBATION SENTENCE WAS
ILLEGAL.*

The district court imposed a three-year sentence of im-
prisonment on appellant Barbara Meyers, but, pursuant to 18
U.S.C. §3651, ordered it served as a split sentence: three
months in a jail-type institution and suspension of the bal-
ance of the sentence. However, it ordered that the period of
probation be four years, to begin upon termination of the
three-month jail sentence. Though a split sentence was clearly
lawful and appropriate here, it is respectfully submitted that
the district court miscalculated the length of the probationary
term permissible under the relevant provision of 18 U.S.C.
§3651. The district court read the statute as authorizing any

*This question of first impression in this Circuit was pre-
viously raised in United States v. Jose Nunez, ___ F.2d ___,
Docket No. 77-1123 (2d Cir., June 23, 1977); in that case,
which was affirmed in open court, this Court found that this
issue, not having been raised below, should be presented to the
district court via a Rule 35 motion and it did not pass on the
merits of the claim. This office filed a Rule 35 motion in
that case, and a decision upholding the legality of the sen-
tence was rendered in the district court on November 18, 1977.
The district judge in Nunez was Judge Pratt, the judge in the
case at bar; thus, no purpose will be served by presenting the
identical claim in this case to Judge Pratt before asking this
Court to pass upon it.

probationary term up to five years. We believe that when a split sentence under the second paragraph of §3651 is imposed, the maximum probationary term available is the length of the sentence that has been suspended.*

Paragraph two of 18 U.S.C. §3651 provides that when a sentence for an offense other than one punishable by death or life imprisonment, in excess of six months, is authorized, the court

... may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

There is an ambiguity at the conclusion of the quoted passage, in that neither punctuation nor syntax establishes whether the phrase "for such period" (relating to the length of probation) is a reference to the preceding phrase "remainder of the sentence" or is an independent term qualified by the subsequent phrase "as the court deems best." If it is a reference back, the statute clearly limits the period of probation on a split sentence to the length of sentence suspended: "... the execution of the remainder of the sentence be suspended and the

*Though the court might, at some later date and for good cause shown, extend the period of probation (to a maximum of five years) under the fourth paragraph of §3651, that cannot rectify the initial error in sentencing which we address.

defendant placed on probation for such period...." If the phrase is to be subsequently qualified, the statute might appear to authorize a probationary term up to five years regardless of the sentence originally imposed: "... the defendant placed on probation for such period and upon such terms and conditions as the court deems best." It appears that the language may be interpreted to support either result; the choice of which interpretation is correct cannot be made by reference solely to the language of the statute.

However, the legislative history and purpose is of assistance in resolving this ambiguity. The provision in question -- the second paragraph of 18 U.S.C. §3651 -- was enacted as Pub.L. 85-741 (72 Stat. 834) and is entitled "One-Count Indictment -- Confinement," and Senate Report No. 2135, reprinted in 1958 U.S. Code Cong. & Admin. News 3841-3843, also reflects the statute's concern for sentencing under one-count indictments:

Purpose

The purpose of the proposed legislation, as amended, is to amend section 3651 of title 18, United States Code, so as to permit confinement for a period not exceeding 6 months in connection with the grant of probation on a 1-count indictment.

Statement

...

Under existing law (see 3651, title 18, U.S.C.), where a defendant is convicted of any offense not punishable by death or life imprisonment, the court may suspend the sentence and place the defendant on probation.

It is clear that in such a case the court,

under existing law, must suspend the sentence and place the defendant on probation.

There are many instances, however, where Federal judges feel that it would be in the public interest for probation to be granted only after the defendant has served a part of a sentence, that there should be some confinement before a grant of probation rather than having probation granted in place of the whole sentence.

In practice, Federal judges have long achieved this result where a defendant is convicted on 2 or more counts by sentencing the defendant on 1 count and granting probation on another count.

The proposed legislation, which applies only to those instances where the court now has authority to grant probation, would permit a similar result to be achieved in the case of a one-count indictment....

This analysis establishes that when only a single sentence of imprisonment is authorized because there is a conviction on a single count, Congress, by this provision of §3651, intended to enable a judge to include in the single sentence two types of punishment. Thus, in determining the precise dimensions of a split sentence, the combined length of the term of custody and the term of probation must not be greater than the single sentence imposed pursuant to the conviction for the single count. A three-year sentence of imprisonment may be divided into three months in jail and two and three-quarter years on probation, for the sum of the sentences is three years. To derive a three-month jail sentence plus a four-year probation sentence from a three-year sentence, however, is no longer a division of the three-year sentence, since the component sentences exceed the actual sen-

tence in length. They constitute not one, but two, sentences. It was legislative recognition of the fact that two sentences may not be imposed on a single indictment count that gave rise to the special provision for splitting one sentence.

Thus, while the language of the statute is ambiguous, the legislative intention is clear and substantiates our claim that the length of the probation term imposed under a split sentence must be limited to the length of the original sentence which has been suspended. Nevertheless, should the Court find that the legislative history does not provide an unequivocal interpretation of the statute consistent with our reading, then the unresolved ambiguity in the statutory language must limit the length of the probationary term to the term of the suspended sentence under the doctrine of lenity. The Supreme Court has held:

[A]s we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971) (additional citations omitted).... Thus, where there is an ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

United States v. Bass, 404
U.S. 336, 347-348 (1971).

Thus, our interpretation, which would result in more lenient sentencing consequences by limiting the length of the probationary term imposable under a split sentence, should be adopted to resolve the ambiguity.

Though we have found no binding authorities who have con-

sidered the precise question raised here, one court has addressed it indirectly. In United States v. Teresi, 484 F.2d 894 (7th Cir. 1973), a panel of the Seventh Circuit (including now Justice Stevens) was asked to construe the following judgment: the three-year sentence was suspended and the defendant was placed on probation for three years; one condition of the probation was that at some unspecified date during the first two and one-half year probation period, subsequently determined by the court, the defendant was to be surrendered to the custody of the Attorney General for a period of six months; but as to that condition, if the court did not in its discretion order the defendant to surrender, the condition was null and the defendant was to serve the entire period of three years on probation. Id., 484 F.2d at 896.

The Seventh Circuit found this sentence to be other than one specifically defined in 18 U.S.C. §3651 due to the floating six-month prison term. Nevertheless, the court declined to find the sentence void; and it concluded that, since the defendant had begun his sentence of probation, double jeopardy and the terms of §3651 required a sentence no more severe than a three-year sentence of imprisonment with execution suspended and probation ordered for three years. Id., 484 F.2d at 897-899. The court expressed its view that the period of probation under a split sentence was limited to the length of the sentence suspended:

18 U.S.C. §3651, second paragraph, would

authorize a sentence of imprisonment for three years, with confinement for six months, execution of two and one-half years suspended, and defendant placed on probation for such period, subject to condition stated with respect to defendant's daughter.

Id., 484 F.2d at 897.

Thus, the court appears to have been of the view that the term of probation allowed upon a split sentence was equal to the portion of the sentence which had been suspended.

CONCLUSION

For the above-stated reasons, the judgment of conviction should be reversed and the case remanded for a new trial; alternatively, the sentence should be modified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Steven L. Berman